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MAR 9 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 915

JOSEPH HARRIS and SADIE SCHWARTZ,

Petitioners,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Joseph Harris and Sadie Schwartz, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court entered in this case on the 12th day of December, 1962, insofar as the petitioners are concerned, which affirmed a judgment of the United States District Court for the Eastern District of New York in respondent's favor and against the petitioners based upon a motion for summary judgment (54a-60a, 67a).

Opinions Below

There was no opinion rendered in the United States District Court for the Eastern District of New York. The opinion of the Court of Appeals for the Second Circuit (R61a-66a) is reported at 310 F. 2d 846. A copy thereof is set forth in the Appendix, *infra*, pages 13-18.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed is dated December 12, 1962, and said judgment was entered on December 12, 1962 (67a, 68a). A copy thereof is set forth in the Appendix, *infra*, page 19.

Title 28, United States Code, § 1254(1), confers on this Court jurisdiction to review said judgment of the Court of Appeals for the Second Circuit by writ of certiorari.

Questions Presented

1. May the United States of America in an action brought pursuant to the provisions of Title 26, United States Code, § 7403, to foreclose government income tax liens against real property of the taxpayer, foreclose and determine the property rights of parties whose interest and title in the real property is separate, apart, hostile and adverse to that of the taxpayer, and whose title is the result of a new, different and independent title acquired from the State under State law of property?

2. Did the United States District Court for the Eastern District of New York have jurisdiction to enter judgment against parties whose interest in the subject matter of the action was in no way through or under the taxpayer-defendant, but was in fact an entirely adverse and hostile interest?

Statutes Involved

Title 26, United States Code; Section 7403. Action to enforce lien or to subject property to payment of tax.

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree. The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

Title 26, United States Code; Section 6338. Legal effect of certificate of sale of personal property and deed of real property.

(a) Deed of real property.—

(1) Deed as conveyance of title.—If the proceedings of the Secretary or his delegate as set forth have been substantially in accordance with the provisions of law, such

deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

McKinney Const. Art. 1, § 10. The people of the State, in their right of sovereignty, possess the original and ultimate property in and to all lands within the jurisdiction of the state. All lands shall forever remain allodial so that the entire and absolute property is vested in the owners, according to the nature of their respective estates. All lands the title of which shall fail, from a defect of heirs, shall revert, or escheat to the people.

Statement of the Case

This action was commenced on May 1, 1959 in the District Court of the United States for the Eastern District of New York by the United States of America against the delinquent taxpayer, Max Herman, and others, to foreclose a Government tax lien against the property interest in a certain parcel of real property possessed by the taxpayer, Max Herman.

The pertinent facts in chronological order are as follows:

May 5th, 1947—Max Herman purchased the premises which are the subject of the action, situate at Great Neck, Nassau County, New York, known on the County Section and Block Map as Section 2, Block 90, Lots 8 and 109.

November 20th, 1947—Income tax for year 1946 assessed against Max Herman. What the amount was does not appear, but on May 9th, 1951, the amount outstanding was $52,626.94.

May 9th, 1951—Notice of Federal Tax Lien was filed in Nassau County Clerk's Office.

May 1, 1959—plaintiff commenced the present action. At that time, the amount of the lien outstanding was $21,570.76. The interest is not stated, but by calculation was about $19,332.00. The appellants were not named as defendants, neither of them having then made their purchases.

On the same day, plaintiff filed a notice of pendency of action in the Nassau County Clerk's Office which it caused to be filed in the proper section and block index, the designating numbers of which were duly endorsed on the instrument.

December 7, 1959—the County Treasurer of Nassau County at a sale held by him pursuant to statute for the unpaid taxes of 1959 sold the premises to Sadie Schwartz for the amount then unpaid—$2,297.66—at an interest rate of 3% every six months.

October 28th, 1960—a judgment and order (one paper) directing a sale of the premises by the U. S. Marshal was made in this action.

December 7, 1960—the County Treasurer of Nassau County at a sale for unpaid taxes of 1960 sold the premises to Joseph Harris in the amount of $2,588.78 at an interest rate of 5% every six months.

January 27th, 1961—the amount due on plaintiff's lien was $45,457.06, being the face amount of $21,570.76, plus interest of $23,886.30.

On the same day, the U. S. Marshal, acting under the order of October 28th, 1960, sold the premises to one Irwin Greenwald for $45,500.00.

Thereafter, a title insurance company advised the purchaser that they would not insure the title of the United States against the collection of the local land taxes, unless the taxes were paid.

On *May 3rd, 1961*, the plaintiff procured an *ex parte* order vacating, in part, the judgment of October 28th, 1960, and amending the complaint to add Sadie Schwartz and Joseph Harris as additional defendants.

On *June 29th, 1961*, another order, on notice, was obtained transferring the claims of appellants and all others to the surplus, if any, resulting from the sale of January 27th, 1961.

The purchaser's advisers remaining, however, dissatisfied with this solution of the problem, on *August 23rd, 1961*, plaintiff obtained a further order cancelling the sale and refunding the deposit to the purchaser.

Plaintiff then made a motion for summary judgment which, after a hearing, resulted in the order and judgment appealed from on *October 30th 1961*. This order and judgment decreed that the right, title and interest of the petitioners in and to the subject real property were forever barred and foreclosed and decreed that the premises be sold free and clear from any such right, title and interest, and further, relegated the petitioners to the surplus in the sale, if any.

No sale has been held and no further steps toward having a sale have been taken.

On appeal, the United States Court of Appeals for the Second Circuit wrote an opinion (Appendix, pp. 13-18) and affirmed the order and judgment below, in which the rights and interest of the petitioners in and to the subject real property were barred and foreclosed.

Reason Relied Upon for the Allowance of the Writ

1. The United States Court of Appeals for the Second Circuit has decided an important question of law involv-

ing the construction of a federal statute in a manner contrary to substantive state law in the field of real property.

It is the contention of the petitioners that they could not be made parties to this civil action under 26 U.S.C. § 7403, to enforce a federal tax lien against property interests of Max Herman, the delinquent taxpayer, nor did the court have any jurisdiction to determine the merits of their claims since petitioners' claims in and to the subject real property were and are entirely hostile and adverse to the title of the debtor, Max Herman.

The petitioners are purchasers of tax titles, affecting the same real property, sold by the County Treasurer of Nassau County for non-payment of local land taxes. These sales and the taxes upon which they are based are adverse to the title and property rights of Max Herman.

They constitute a property of these petitioners—not a property in which Herman ever had any right, title or interest, and, consequently, not the "property of the delinquent" as described in § 7403 in respect to which an action such as this is authorized.

With regard to the effect of a deed delivered in a tax delinquency seizure, 26 U.S.C. § 6339 (b)(2) states that the deed delivered "shall be considered and operate as a conveyance of *all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto*" (emphasis added).

The income tax lien attached, admittedly, on November 20, 1947. All liens, except tax liens, which attached thereafter, were a part of Max Herman's title on that date, were dependent on it and were derived from it. But not the real property taxes.

The real property taxes were not in existence on the day the United States lien attached to Herman's title. They are not, and never have been a part of his title, dependent on that title, or derived from it.

The law of the State of New York is emphatic in that regard.

> "We are of the opinion that one who acquires real estate pursuant to tax sale is not in privity with the former owner. The owner does not grant his title. Such a purchaser is a grantee of the state. . . . The owner of the tax title obtains the land free of encumbrances of every character . . ."
>
> *O'Donnell* v. *McIntyre*, 118 N. Y. 156, 162.
>
> "Each tax title is completely independent of every other and is itself a new, original and independent title."
>
> *Inter-County Oper. Corp.* v. *Co. of Nassau*, 267 App. Div. 957, 958.
>
> "There is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from it but in antagonism to the former. The holder of the latter is not a privity in estate with the holder of the former."
>
> *Hussman* v. *Durham*, 165 U. S. 144, 147.

The tax titles of each of the petitioners is a hostile title, adverse to that of Herman, and, like everyone else in the State of New York, and probably in the country, is conditioned upon the payment of taxes levied by the State. If not paid, the State has reserved the right and power to end his title and to grant a new and independent title (Constitution, New York State, Article 1, § 10).

In *United States* v. *Meyer*, 199 F. Supp. 508 (1961), at page 518, in citing with approval and quoting from *Atkins*

v. *Hinman* (1845), 2 Gilman (Ill.), 437, 438, where the court there referred to a sheriff's sale for unpaid taxes, the court set forth as follows:

> "The judgment is against the land not against a particular individual. The land itself is sold, and not a particular interest in it. If the land was subject to taxation and the proceedings under the revenue law have been regular, and the owner has failed to redeem within the time limited by law, then the whole legal and equitable estate is vested in the purchaser. A new and perfect title is established. This results from the paramount authority of the state to levy taxes on property within its limits and coerce the payment by subjecting the property to sale. It is one of the necessary and inherent rights of the sovereign power. This case therefore, is not like the sale of the one under the ordinary judgment where the purchaser only succeeds to the title, which the debtor had at the recovery of the judgment."

This very condition of title was clearly expressed in Governor Nicoll's Patent of March 6, 1666 to the Town of Hempstead, which included the subject property "rendering and paying such dutyes and acknowledgements as now or hereafter shall be constituted and established by the laws of the Government."

Neither any form of reversion nor escheat could occur unless the original grant had been on condition.

What led the learned lower Courts astray was the apparent belief that there is but one title to any given parcel of real property. This is a common but quite erroneous thesis. Title acquired by adverse possession is a title free and clear of any liens, encumbrances or infirmities which there may have been upon the title of the former fee owner. The possessor of title by adverse title has a new and independent title to the property. His claim is

certainly not in any way through or under the interest of the former fee owner. This was recognized in *United States* v. *Pledger*, 158 F. Supp. 612, where the court held a federal tax lien inferior to the title of an individual to a portion of real property to which the individual had rights solely by possession and occupancy, and not by virtue of deed or grant from the fee owner-delinquent.

The order and judgment appealed from should have decreed the sale of "the right, title and interest which Max Herman had in and to the subject property" and not to have decreed that the property be "free and clear of all liens, claims, interests . . . of whatever kind and nature existing in favor of any party" (R56a).

Under 26 U.S.C. § 7403, the District Court had the power to determine the validity of other claims upon Herman's title, but none to determine claims of title adverse to that of Herman and not in any way derived from or dependent on his title. Herman's rights in the real property in question is a matter of state law.

> "The . . . question . . . is whether and to what extent the taxpayer had 'property' or 'rights of property' to which the lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute.'"
>
> *Aquilino* v. *United States*, 363 U. S. 509.
>
> "Only when the Federal tax lien has attached to the taxpayer's State-created interests, does the Federal law determine the priority of competing liens against the taxpayer's property or rights to property. . . . Rules of property and fixing the incidents of property ownership are rules of state law which the Federal courts will respect."

Chicago Federal Savings & Loan Assn. v. *Cacciatore*, 25 Ill. 2d 535, 185 N. E. 2d 670, 673, 675.

"Our State law has not characterized the nature and extent of the Federal tax lien, but has determined the nature and extent of the property interests of the taxpayer (admittedly a state function), *which in the case of real property is conditioned upon the payment of annually recurring governmental land taxes*, the payment of which may not be avoided by a foreclosure sale." (emphasis added)

Buffalo Savings Bank v. *Victory*, 11 N. Y. 2d 31, 36, 37, reversed —— U. S. ——, January 7, 1965.

In both the dissenting opinion in the *Buffalo Savings Bank* v. *Victory* case in the Court of Appeals and in the *Per Curiam* opinion of reversal in this Court, the fact that local land taxes would have to be paid was recognized; the only difference of opinion being as to whom would be responsible for payment.

It is the petitioners' position, however, that we are not here dealing with some lien or claim or interest upon the title or interest of the taxpayer, but with a property right (not a lien) of ownership of real property acquired under state law and from the state itself.

It is the further position of the petitioners that the District Court was without jurisdiction to pass upon the rights of the petitioners in this foreclosure action, for the reason that they were in no way in privity with the debtor through whom the government sought to enforce its rights.

"A foreclosure action is not the proper mode to litigate rights claimed in priority or hostility to the mortgage. A judgment passing upon them is erroneous."

Merchants Bank v. *Thomson*, 55 N. Y. 7, 11.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

ALBERT M. GOLDBERG,
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Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 50—October Term, 1962

(Argued November 8, 1962 Decided December 12, 1962)

Docket No. 27381

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MAX HERMAN, *et al.*,

Defendants,

and

JOSEPH HARRIS and SADIE SCHWARTZ,

Defendants-Appellants.

Before:

MEDINA, SMITH and KAUFMAN, *Circuit Judges.*

Appeal by purchasers of tax liens on real estate at County tax sales from summary judgment on motion of plaintiff in action by United States for foreclosure by sale of tax lien in the United States District Court for the Eastern District of New York, Matthew T. Abruzzo, D. J. Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit.

RALPH A. MCGOLD, Attorney, Dept. of Justice, Washington, D. C. (John B. Jones, Jr., Acting Asst. Attorney General, Lee A. Jackson and Joseph Kovner, Attorneys, Dept. of Justice, Washington, D. C. Joseph P. Hoey, United States Attorney for the Eastern District of New York, and Philip Silverman, Asst. United States Attorney, on the brief) *for plaintiff-appellee.*

ALBERT M. GOLDBERG, Mineola, New York, *for defendant-appellant Sadie Schwartz.*

MILDRED MCGINITY, Mineola, New York, *for defendant-appellant Joseph Harris.*

SMITH, *Circuit Judge:*

This is an appeal from a summary judgment, without opinion, of the United States District Court for the Eastern District of New York, Matthew T. Abruzzo, District Judge, granting foreclosure of a tax lien of the United States as prior in right to tax liens on real property acquired by appellants by purchase at Nassau County tax sales. The appeal from a final decision of the District Court is properly before us under 28 U. S. C. § 1291. We hold that the federal tax lien had priority over the county and school tax liens and affirm the judgment.

The Commissioner of Internal Revenue made an assessment of income taxes for 1946 and 1947 against Max and Mattie Herman in the amount of $56,521.39. The list was received by the Collector for the Third District of New York November 20, 1947, and transferred to the Collector for the First District of New York April 29, 1949. Notice of

federal tax lien was filed on May 15, 1951 with the County Clerk of Nassau County, where the property in question is located. The section and block numbers of the property were not endorsed on the notice of lien when filed. Action to foreclose the Government lien was commenced May 1, 1959, and motion for summary judgment for the plaintiff was granted as to the lien for 1946 taxes on July 27, 1960 (*United States* v. *Herman*, 186 F. Supp. 98, E. D. N. Y.). A sale was had pursuant to the judgment of October 28, 1960 on a high bid of $45,500 on January 27, 1961, the amount due on plaintiff's lien at that time being $45,457.06. A title insurance company refused to insure the title against the local taxes involved and an order was entered cancelling the foreclosure sale. Appellant Sadie Schwartz had purchased a tax lien on the property for unpaid school taxes for the year 1958-59 and for county taxes for the year 1959 on December 7, 1959 for the sum of $2,297.66. Appellant Joseph Harris had purchased a tax lien on the property for unpaid school taxes for the year 1959-60 and for county taxes for the year 1960 on December 5, 1960 for the sum of $2,465.51. Neither Nassau County nor Schwartz nor Harris were parties to the original foreclosure action. An order was obtained on May 3, 1961 vacating in part the judgment of October 28, 1960, permitting completion of service on Nassau County and permitting service of a supplemental summons and complaint on Schwartz and Harris, who appeared and answered. Thereafter the order granting summary judgment for plaintiff and directing sale free and clear of all claims including local taxes and tax liens was entered October 30, 1961, from which this appeal was taken by Harris and Schwartz.

Appellants first insist that the lien of the United States is invalid as to them as it had not been properly filed within

the meaning of § 3672, I. R. C. of 1939, which provides that: "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector.[1] * * *" Appellants are plainly neither mortgagees, pledgees, nor judgment creditors. Presumably they claim to be purchasers. However, their interest was taken from Nassau County, which as lienor is not within the classifications of § 3672. *United States* v. *City of New York*, 233 F. 2d 307, 308 n.1 (2 Cir. 1956). Appellants do not show that they rise above their vendor, as might perhaps be the case when one purchases for value from a donee. The Supreme Court has stated that "a purchaser within the meaning of § 3672 usually means one who acquires title for a valuable consideration in the manner of vendor and vendee." *United States* v. *Scovil*, 348 U. S. 218, 221 (1955). Appellants do not acquire title, as the term is normally understood, and have no right to possession as a result of their "purchase." See *United States* v. *Mojac Construction Corp.*, 190 F. Supp. 622, 631 (E. D. N. Y. 1960). The regular yearly sales of the interests in question make it abundantly clear that what is being sold is a lien upon the land and not the land itself. This interest does not make the County a "purchaser", and that is equally true when it passes to the appellants. *United States* v. *City of New York*, *supra*.

In any event, the failure of the United States to place a section and block description on its notice of lien does

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[1] New York Lien Law, section 240, provides for filing of federal tax liens in the office of the clerk of the county in which the real property is located. Subdivision (a)(1) of § 3672 is thus applicable: "(1) Under State or Territorial Laws. In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory."

not invalidate the lien against later-acquired interests. It was filed in the proper office, that of the Nassau County Clerk, and was easily discoverable through a search of the separate alphabetical index of federal tax liens. The state is permitted to designate the place of filing under § 3672(a)(1), and the government complied with this designation, but the state may not add further requirements for validity. See *United States* v. *Union Central Life Ins. Co.*, 368 U. S. 291 (1961). A contrary result would unduly complicate federal tax collection and, in this situation, require a constant policing effort by the Collector to bring the recording up to date so that it would apply to after-acquired property, as it rightfully does under the federal law. See § 3670, I. R. C. of 1939.

As the lien is thus valid against the appellants, and it is admittedly prior in time, ordinarily this would be the end of the case. *United States* v. *New Britain*, 347 U. S. 81 (1954), specifically has held that later-arising local tax liens were not to be paid prior to an earlier federal tax lien, despite state law to the contrary. "Priority of these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right'." *Id.* at 85. But appellant directs our attention to *Buffalo Savings Bank* v. *Victory*, 11 N. Y. 2d 31, 181 N. E. 2d 413 (1962), cert. granted 370 U. S. 915. As we understand this decision, it holds that local taxes may by state law (New York Civ. Prac. Act § 1087) be made into "expenses of sale" in a mortgage foreclosure and thus paid prior to an earlier federal tax lien, which must be satisfied from the surplus after sale. *New Britain* is said to be distinguishable, as it refers to a direct contest between the United States and the local government while the situation in *Buffalo Savings Bank* is a confrontation of the mortgagee and a creditor (the United States) of the mortgagor. While intimat-

ing no opinion as to the validity of the distinction or the correctness of the decision generally, though we are ordinarily bound to follow state determinations of the nature of property interests (but not state orders of priority), cf. *Aquilino* v. *United States*, 363 U. S. 509 (1960), we think that on its own terms it is inapplicable here. The controversy at bar is between the United States and persons standing in the right of the local taxing unit. No mortgage is involved. There is, therefore, no obstacle to the application of the holding of *New Britain* to the question in the present case.

We find no merit in other miscellaneous contentions made by appellants. The attempt to assimilate local property taxes to maritime liens, where the last in time is the first in right, is based on no more than appellants' desire to have us accept that rule. The rationale of the admiralty doctrine is obviously inapplicable here. Nor will we subject the government to a requirement that it marshall assets in favor of junior lienors, as this would create an extreme burden on collection of the revenue, unauthorized by statute. Finally, the thesis cannot be accepted that the property here reverted to the County for nonpayment of taxes, wiping out all prior encumbrances at that instant. There is no support in New York law for a doctrine which would make all land within the state held on this implied condition subsequent. And if there were, it might well be that this would fall beyond the bounds of permissible state characterization of property interests. See *United States* v. *Acri*, 348 U. S. 211 (1955).

Judgment affirmed.

Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of December, one thousand nine hundred and sixty-two.

Present: Hon. HAROLD R. MEDINA,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAX HERMAN, *et al.*,
Defendants,

JOSEPH HARRIS, SADIE SCHWARTZ,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.